IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE M.SASIDHARAN NAMBIAR

WEDNESDAY, THE 7TH FEBRUARY 2007 / 18TH MAGHA 1928

RSA.No. 792 of 2006(C)

AS.237/2000 of I ADDL. DISTRICT COURT, TRIVANDRUM
OS.898/1998 of III ADDL.M.C.,TRIVANDRUM

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APPELLANT/APPELLANT/FIRST DEFENDANT:

SREENIVASAN EMBRAN @ EMBRANTHIRI,
KOOPAKKARA MADAM STREET, FORT,THIRUVANANTHAPURAM.

BY ADV. SRI.M.BALAGOVINDAN
SRI.M.R.SASITH

RESPONDENTS: RESPONDENTS/PLAINTIFFS & 2ND DEFENDANT:

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1. ANANTHAKUDA RESIDENTS ASSOCIATION,
REPRESENTED BY ITS SECRETARY, MR.SURENDRAN NAIR,
RESIDING AT T.C.37/404, KOOPAKKARA MADAM STREET,
FORT, THIRUVANANTHAPURAM.

2. V. PADMANABHAN,
RESIDING AT T.C.37/385, KOOPAKKARA MADAM STREET,
FORT, THIRUVANANTHAPURAM.

3. M. SUBRAMONIAN,
RESIDING AT T.C.37/356, KOOPAKKARA MADAM STREET,
FORT, THIRUVANANTHAPURAM.

4. ARUNKUMAR,
RESIDING AT T.C.37/401, KOOPAKKARA MADAM STREET,
FORT, THIRUVANANTHAPURAM.

5. MADHAVAN NAIR,
RESIDING AT T.C.37/402, KOOPAKKARA MADAM STREET,
FORT, THIRUVANANTHAPURAM.

6. T.P. SUBRAMONIAN,
RESIDING AT T.C.37/344, KOOPAKKARA MADAM STREET,
FORT, THIRUVANANTHAPURAM.

7. RAMASWAMY,
RESIDING AT T.C.37/324, KOOPAKKARA MADAM STREET,
FORT, THIRUVANANTHAPURAM.

8. DR.KESAVAN POTTI,
RESIDING AT T.C.37/417(1), KOOPAKKARA MADAM STREET
FORT, THIRUVANANTHAPURAM.

9. L. SREEPATHI,
RESIDING AT T.C.28/1213, SREEKANTESWARAM,
THIRUVANANTHAPURAM.

10. DWAPARA,
HAVING ITS OFFICE AT T.C.37/355,
KOOPAKKARA MADAM STREET, FORT,THIRUVANANTHAPURAM,
REPRESENTED BY ITS SECRETARY.

BY

THIS REGULAR SECOND APPEAL HAVING COME UP FOR ADMISSION ON 07/02/2007, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:

M.SASIDHARAN NAMBIAR, J.

R.S.A.NO.792 OF 2006

Dated this the 7 th day of February, 2007.

J U D G M E N T

First defendant in OS 898/98 on the file of Additional Munsiff Court, Trivandrum is the appellant. Respondents 1 to 9 are plaintiffs. First respondent is residents association represented by its secretary and respondents 2 to 8 are its members and 9th respondent member of general public. The suit was filed under Section 91(b) of Code of Civil Procedure seeking a decree restraining appellant and tenth respondent, from obstructing free movement of the user of the road and the lane, being used by respondents. No steps was taken as against tenth respondent by respondent 1 to 9. Appellant filed a written statement contending that Section 91(b) of Code of Civil Procedure has no application to the case. It was also contended that in front of Nagaraja Temple, there is a small plot of land about 2 cents in extent and it is a puramboke land and this plot is used by the public for worshiping the deities and it is a private temple and appellants used to put up a temporary sun shade in front of Nagaraja temple and it is being removed after the festival season and it is necessary for the convenience of large number of devotees gathering at temple and respondents 1 to 9 are not entitled to the decree sought for. Learned Munsiff on evidence of PW1 to 2, Ext.A1 and A2 and B1 found that the reliefs

sought for in the suit comes under Section 91(b) of Code of Civil Procedure. Though it was contended by appellant that suit is not maintainable without permission under Rule 8 of Order I, relying on the decision of this court in *D.L. Walton v. Cochin Stock Exchange* (AIR 1985 Kerala 106) it was held that when a suit was filed obtaining sanction under Section 92 of Code of Civil Procedure, no publication as provided under Order I rule 8 is necessary and the suit is maintainable. Learned Munsiff on the evidence found that by putting up structure in front of the temple, encroaching the puramboke land and that too without obtaining permission from the Corporation, appellant is obstructing the usage of the lane and road therefore a decree for permanent prohibitory injunction restraining appellant from causing any inconvenience or obstruction to the road and the lane was granted. Learned Munsiff without noting the fact that no steps was taken against tenth respondent, granted a decree against tenth respondent (second defendant) also. Learned Additional District Judge, in A.S 237/2000 re-appreciated the evidence and found that appellant has no right to cause any obstruction by constructing unauthorised structures in the Government land and therefore confirmed the decree and judgment. But holding that respondents 1 to 9 did not take steps as against 2nd Defendant, decree granted as against second defendant was set aside. The appeal was dismissed. The appellant is challenging the said judgment in the second appeal.

2. Learned counsel appearing for appellant was heard.

3. The argument of learned counsel appearing for appellant was that learned Munsiff on the evidence found that plaintiffs have already availed of the remedy available under the Kerala Municipalities Act and provisions of Section 41(h) of Specific Relief Act was got over by observing that plaintiffs could not get the benefit of that order as obstruction was not removed and when section 41(h) provides that injunction cannot be granted when equally efficacious relief can be obtained by other mode and the court found that plaintiffs have already obtained an equally efficacious remedy, a decree should not have been granted. Learned counsel also argued that plaintiffs have no such case in the plaint and so courts should not have granted the relief on a ground not set up by the plaintiffs. Learned counsel also argued that Appellate court did not consider this aspect at all and therefore the question whether plaintiffs are entitled to a decree for injunction when they have already availed of an equally efficacious relief is a substantial question of law to be decided in the appeal.

4. 41(h) of the Specific Relief Act reads as follows:-

41: Injunction when refused - An injunction cannot be granted-

a) x x x x x x

b) x x x x x x

c) x x x x x x

d) x x x x x x

e) x x x x x x

f) x x x x x x

g) x x x x x x

h) "when equally efficacious relief can certainly be obtained by any other usual mode of proceeding except in case of breach of trust".

5. Under Sub section (h) of Section 41, when an equally efficacious relief can certainly obtained by any other usual mode of proceeding, the relief of injunction cannot be granted. The question is whether plaintiffs have an equally efficacious relief to the one which was sought for in the suit. True, when unauthorised construction was made by appellant causing obstruction to the public road and lane, plaintiffs approached the Corporation to get the obstruction removed and the Corporation passed an order directing its removal. But that cannot be a substitute for the relief of permanent prohibitory injunction sought for in the plaint. The contentions of appellant was that each year during festival season for convenience of the public they used to put up structures and this structures will be removed after festival season. The decree sought for is a permanent prohibitory injunction restraining appellant from obstructing the free movement and use of the road and lane by the public including the plaintiffs. The removal of temporary structure put by appellant which was granted by the Corporation, cannot be

an equally efficacious remedy sought for in the suit because each year appellant used to put up the structure and the remedy of plaintiffs could only to approach the Corporation each year to get the structure removed. It is not an equally efficacious remedy. Therefore I cannot agree with the arguments, that there is an equally efficacious remedy which prevents the court from granting a decree for injunction in favour of plaintiffs as provided under 41(h) of the Specific Relief Act. Therefore it cannot be taken as a substantial question of law involved in the case.

Learned Munsiff and learned Additional District Judge rightly appreciated the evidence and found that the plaintiffs are entitled to the decree granted. I find no merit in the appeal.

Second appeal is dismissed.

M.SASIDHARAN NAMBIAR,
JUDGE.

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